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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 404

SOUTHERN MINERALS CORPORATION, *Petitioner*,

v.

JAY SIMMONS, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit, and

BRIEF IN SUPPORT THEREOF

SOUTHERN MINERALS CORPORATION,
By BIRGE HOLT,
Corpus Christi, Texas;
By DAN MOODY,
Austin, Texas;
By RALPH R. WOOD,
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ALPHA LAW BRIEF CO., HOUSTON, TEXAS

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

---

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The petition of Southern Minerals Corporation for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit respectfully shows to this Honorable Court:

I.

Summary Statement of the Case

On March 24, 1930, T. M. Harrell and wife, as lessors, executed to R. D. Kelly, as lessee, an oil and gas lease upon 333 acres of land in Nueces County, Texas (R. 385). Houston Oil Company of Texas (hereinafter called Houston), having become owner of said oil and gas lease, on April 5, 1932, for a recited consideration of $177,750.00, assigned to Southern Alkali Corporation (hereinafter called Southern Alkali) all its right, title and interest in *six oil* and gas leases, including the Harrell lease, covering *in excess of 1300 acres,* **"insofar as the same cover the gas rights * * * together with three certain gas wells now completed thereon."** The assignment contained no reservation or exception. It was, however, made "subject to the following specific understanding and agreement, viz.:

> "Should Southern Alkali Corporation, or its assigns, as a result of its operation on said leases, or either of same, discover oil in any well drilled on said lands, said Southern Alkali Corporation agrees to set casing in said well and make a thorough and workmanlike test thereof with a view to bringing in an oil well. Should said well, when completed, produce as much as fifty (50) barrels of oil per day for ten (10) consecutive days, the Houston Oil Company of Texas, may at its option, within forty (40) days after completion, take over and own said well by paying to Southern Alkali Corporation the cost actually incurred in drilling and equipping said well, exclusive of any overhead charges * * * ."
>
> "*Should Houston Oil Company of Texas, as a result of its operations, discover gas in any well drilled on said land in any well drilled by the Houston Oil Company of Texas in an unsuccessful effort to complete a commercial oil well, the said Houston Oil Company of Texas agrees to complete said well as a gas well; and should*

said well, when completed, produce merchantable gas in marketable quantities, the Southern Alkali Corporation may, at its option, within forty (40) days after the completion, take over and own said gas well by paying to the Houston Oil Company of Texas the cost actually incurred in drilling and equipping said gas well, exclusive of any overhead charges, and exclusive of any drilling costs below the producing horizon. Provided, however, it is distinctly understood and agreed that the Houston Oil Company of Texas shall not have the right or privilege of completing more than five (5) such gas wells. * * *" (Italics added.) (R. 386, 389-396.)

The clauses just quoted will be referred to hereafter as the contract provisions of said assignment.

On September 15, 1933, Southern Alkali assigned and conveyed to Petitioner, Southern Minerals Corporation, all the leasehold *gas rights* thus acquired by it from Houston (R. 386-396).

On January 6, 1938, six years after Houston had assigned its gas and gas rights to Southern Alkali, Houston assigned to Respondents, Simmons and Webb, the leasehold *oil rights* in *a portion* of the 333-acre Harrell lease and a *portion* of the Lawrence lease, two of the six leases covering 1300 acres of land included within such previous assignment of gas and gas rights to Southern Alkali (R. 386, 399, 403). Such assignment recited in substance:

"Whereas First Party is the owner of the *oil rights* under an oil and gas lease from Harrell and wife to Kelly * * * ; and whereas First Party is the owner of the *oil rights* under an oil and gas lease from Lawrence and wife to Harrell and Harrell to Kelly * * * ; and whereas it is the intention of this instrument for First Party to assign to Second Parties the *oil rights* under said existing leases *insofar as they cover a portion of the above described lots,* in consideration of the drilling of certain wells and the payment of *overriding royalty* as herein

provided * * * , Houston Oil Company does hereby bargai[illegible] sell, transfer and assign, subject to the performanc[illegible] the obligations here imposed, unto Jay Simmons an[illegible]. Webb, their heirs and assigns, all of its rights u[illegible]d existing leases in so far as same cover 13/16ths w[illegible]king interest in the *oil rights* in and to Lots 23, 24 and 27 except the east 20 thereof, Lot 20 and part of Lot 13; * * * it is understood that it is the intention of the Parties of the First Part that this assignment of *oil rights* shall assign to Second Party all of the rights under the existing oil and gas leases *except the rights of the Southern Alkali Corporation and/or Southern Minerals Corporation as evidenced by contract and assignment of gas rights of April 5, 1932,* * * *, to which instrument and all the terms thereof reference is hereby made as if same were fully copied herein. * * * As further consideration for this assignment Houston Oil Company reserves an overriding royalty of 1/8th *in oil*, that is 1/8th of 8/8ths of the value or proceeds of the *oil* which shall be actually produced." (Italics added.) (R. 386, 399-403.)

In no sense does such instrument purport to assign any gas rights. In the granting clause and throughout the instrument, it will be noted, reference is made solely to "*oil rights.*"

On July 5, 1938, the well with respect to which the immediate controversy arises, was completed by Respondents, Simmons and Webb, on the Harrell land. The well since completion has produced and is capable of producing great quantities of gas.

On or about August 9, 1938, under a written contract dated July 30, 1938 (R. 420-421), Respondents, Simmons and Webb, began selling and delivering gas from such well to Respondent, Southern Coast Corporation (R. 188) for fuel purposes and for jetting oil wells in Corpus Christi Field (R. 189), an entirely different field from that in which the well in controversy was situated. In such operations Respondents, Simmons and Webb, to the time of trial in the District

Court, had produced from said well and sold to Respondent, Southern Coast Corporation, approximately one half billion cubic feet of gas (R. 189), and, as an incident to such gas withdrawals, had obtained, appropriated and sold 19,126.33 barrels of hydrocarbon liquids (R. 448-453), a very substantial portion of which resulted from condensation of gas existing as such in the producing sand (R. 102, 115, 144, 145, 283-288, 327-329, 459).

Alleging its ownership of gas in place and, in consequence, its ownership of the liquid condensates therefrom, Petitioner, by suit instituted in the District Court for the Southern District of Texas, sought to enjoin such appropriation and sale of its gas as a continuing trespass upon its real property right and estate therein and to recover damages for gas and products of gas theretofore taken by Respondents (R. 15-21). To Petitioner's suit Respondents, by their answer, asserted (R. 23): That the well in controversy is an oil well, and that as a result Respondents are vested with *absolute* title (as distinguished from a mere right of reasonable user) to gas produced therefrom with oil, and that accordingly they had the right to sell and dispose of the gas; but in the alternate, if the well is a gas well, Respondents are vested with all the rights of Houston and drilled the well in compliance with said contract provisions (giving to Houston the right to drill five gas wells and take the products therefrom upon failure of Southern Alkali to exercise the option given it), and, Petitioner having failed to take over the well in forty days, Respondents are entitled to all the products thereof (R. 24, 25).

It thus appears that the parties join issue as to their respective rights in gas from such well whether it be an oil well *or* a gas well. If the well is an oil well, the principal question of law is whether Respondents, owners of the oil rights only, are entitled to take and sell as their own the gas produced

with the oil, and thus defeat Petitioner's vested estate in the gas, or are limited to a mere right of user of the gas as an instrumentality in producing their oil. If the well is a gas well, the principal questions of law are whether Respondents have succeeded to Houston's rights under the contract provisions, whether the well in controversy was drilled by Respondents in compliance with the conditions of such contract provisions, and whether Petitioner has forfeited its title to the gas from the well.

After full trial upon the merits, the District Court rendered judgment denying Petitioner any relief (R. 32). That Court wrote no formal opinion, but filed Findings of Fact and Conclusions of Law (R. 33-46), finding and concluding in substance: (1) That the well *in fact* is an oil well (R. 41, 42, 45 and 46), and that Respondents, as a matter of law, were *owners* of the gas produced from said well with oil, with the consequent right to *sell* and *dispose* of such gas (R. 43-46), despite the fact that Petitioner was owner of gas in place without exception or reservation and had no right to take over any oil well completed by Respondents. (2) That the right of Houston, under the contract provisions of its assignment to Southern Alkali, to complete gas wells up to five in number and take the products therefrom in the event Southern Alkali, or its assigns, failed to take over such wells, was assignable and was, in fact, assigned (by the assignment above referred to) by Houston to Respondents, Simmons and Webb; and *if* the well in question were a gas well, the products of the well were property of Respondents, Simmons and Webb, and Petitioner could not complain of the production and sale of gas therefrom because Petitioner had failed to take over the well within the forty-day period provided, and had waived and was estopped to assert such right (R. 33-41). The District Court made no finding of fact and expressed no conclusion of law as to whether Respondents had

complied with the conditions upon which their right to complete the well as a gas well depended.

On appeal the Court of Appeals, in affirming the judgment of the District Court, *assumed*, without definitely finding as a fact, "that this is *not* a well 'producing as much as 50 barrels of oil per day' but is a well producing merchantable gas in marketable quantities," and, accordingly, assumed the well is a *gas well* as described in the contract provisions of the assignment from Houston to Southern Alkali. Upon such assumption the Court of Appeals held that the right of Houston to complete five such gas wells was assignable and was, in fact, assigned by it to Respondents, Simmons and Webb; that Petitioner had failed to exercise its option to take the well over; and that consequently the products thereof belonged to Simmons and Webb. JUDGE HUTCHESON dissented from the view of the majority that the right of Houston to complete five gas wells was assigned to Respondents, Simmons and Webb, by the assignment dated January 6, 1938, and upon that basis thought the case should be reversed and Petitioner granted the relief it sought.

Notwithstanding the District Court found as a fact that the well is an *oil well* as defined in the contract provisions of the assignment to Southern Alkali (R. 41, 42, 44, 45 and 46), the Court of Appeals did not expressly reject that finding of fact and substitute its own contrary finding therefor, but merely "assumed," without definitely finding as a fact, that the well is a *gas well* as therein defined, and then proceeded to dispose of the rights of the parties upon such "assumption." The Court of Appeals expressed no opinion upon, but left to surmise and speculation, the rights of the parties in gas from the well in question if, *as found as a fact by the District Court*, the well is in fact an "oil well." By this anomalous procedure the Court of Appeals, without accepting or rejecting the finding of the District Court that the well in controversy is an *oil*

well, adjudicated the rights of the parties upon the *hypothesis* that such well is a *gas well,* but failed and refused to determine the respective rights of the parties upon the contrary *finding* by the District Court that the well is an oil well.

The Court of Appeals further held in effect that Petitioner having alleged that "Simmons and Webb completed the well 'in an unsuccessful effort to produce oil,' " was precluded *because of this pleading* from contending that Respondents had not complied with the conditions of the contract provisions of the assignment from Houston to Southern Alkali limiting Houston's right and duty to complete the well in question as a gas well, notwithstanding the fact that Respondents, by their undisputed testimony upon the trial in the District Court, confessed that they had not complied with such conditions.

The opinion of the Court of Appeals is reported in 111 Fed. (2d) 333 (R. 456). Petition for rehearing was overruled without further opinion, or statement of findings of fact, or conclusions of law (R. 478).

II.

Jurisdiction

Judgment of the Court of Appeals is dated April 25, 1940 (R. 471). Petition for rehearing was filed on the 14th day of May, 1940 (R. 472), within twenty-one days from the date of the judgment as permitted by the rules of the Circuit Court of Appeals for the Fifth Circuit (Rule 29), and was denied June 11, 1940 (R. 478). Petition for writ of certiorari was filed in this Court within three months from the date upon which the petition for rehearing was overruled. Jurisdiction of this Court is thereby timely invoked under Sec. 240(a) of the JUDICIAL CODE, as amended (Sec. 347(a), Title 28, U.S.C. A.), and Rule 38(5b) of this Court, and Sec. 240, 8(c) of the

JUDICIAL CODE, and Sec. 350, Title 28, U.S.C.A. NATIONAL LABOR RELATIONS BOARD v. MACKAY RADIO & TELEGRAPH CO., 304 U.S. 333, 343-344; UNITED STATES v. SEMINOLE NATION, 299 U.S. 417, 419-420; ROGERS v. HILL, 289 U.S. 582, 586-588; CITIZENS BANK OF MICHIGAN CITY, IND., v. OPPERMAN, 249 U.S. 448, 449; TEXAS & PACIFIC RAILWAY CO. v. MURPHY, 111 U.S. 488, 489; ROBERTSON AND KIRKHAM, Jurisdiction of the Sup. Ct. of the U. S., Sec. 354, p. 720.

Questions Presented

(1) Did the Court of Appeals properly decide the issues before it by *assuming*, but not finding as a fact, that the well in controversy is a gas well, and by failing and refusing to determine the rights of the parties to gas produced therefrom if the well, as expressly found by the District Court, is in fact an oil well?

(2) Do Respondents, as owners of the leasehold oil rights in the Harrell land, also own gas produced from a well drilled by them which produces both oil and gas, notwithstanding the leasehold gas rights in such land were vested in Petitioner by prior conveyance, or do they have only the appurtenant right of reasonable user of such gas as a lift of the oil?

(3) Did the Court of Appeals correctly hold that Petitioner, having alleged that Respondents Simmons and Webb, "in an unsuccessful effort to produce oil from said land, drilled, and on or about July 5, 1938, completed a well thereon producing and capable of producing great quantities of gas," was precluded *by its pleadings*, despite the express provision of Rules 15 (b) and 54 (c) of the RULES OF CIVIL PROCEDURE, from contending that Respondents had not discovered gas therein "in an unsuccessful effort to complete a commercial oil well," within the terms of the contract provisions, even

though that fact was true and had been conclusively established by judicial admissions made by Respondents at the trial in the District Court?

(4) Since the right of Houston, under the contract provisions of its assignment to Southern Alkali, to complete five gas wells and to take the products therefrom upon the failure of Southern Alkali, or its assigns, to take over said wells, was expressly limited to those instances in which Houston "as a result of its operations discover gas in any well drilled by Houston Oil Company of Texas in an unsuccessful effort to complete a commercial oil well," did the Court of Appeals correctly hold that Respondents, Simmons and Webb, had complied with such conditions simply because "the drilling" of the well in controversy "was continued beyond the gas strata," in which it was completed, "in a search for oil still lower, when the drill was twisted off in the hole," in the light of the undisputed testimony of Respondents that a good oil well could have been completed in three or four shallower sands and that the well in question was not completed "in an unsuccessful effort to complete a commercial oil well" as was required by the contract provisions of such assignment?

(5) Was the right of Houston to complete five gas wells under the contract provisions of its assignment to Southern Alkali, assignable by it to Respondents, Simmons and Webb?

(6) Was the right of Houston to complete five gas wells intended to be, and was it, in fact, assigned by Houston to Respondents, Simmons and Webb, by the assignment dated January 6, 1938, as held by the majority of the Court of Appeals, JUDGE HUTCHESON dissenting?

(7) Did the Court of Appeals correctly hold that the rights of Petitioner under the contract provisions of the assignment by Houston to Southern Alkali defining Petitioner's right to take over a gas well drilled by Houston are to be governed by rules relating to simple options, of which time is the

essence, placing upon Petitioner the burden of showing that it had exercised the option within the time therein provided, or are such rights to be governed by the rules relating to provisions for forfeiture, placing upon Respondents the burden of showing strict compliance with all prerequisites to accomplish such forfeiture?

Reasons for Granting Writ

(1) In disposing of the issues before it, the Court of Appeals, by *assuming*, but not finding as a fact, that the well in controversy is a gas well, and by failing and refusing to determine the rights of the parties to gas produced therefrom if the well, as expressly found by the District Court, is in fact an oil well, has so departed from the accepted and usual course of judicial procedure as to call for the exercise by this Honorable Court of its power of supervision. It was the duty of the Court of Appeals, particularly upon timely request by Petitioner in its petition for rehearing, to state in writing its findings of fact and conclusions of law with respect to the rights of the parties in gas from the well in question if such well were, as found by the District Court, in fact an oil well, or to state the reasons for its failure to do so.

There is in issue not only (1) Petitioner's rights in gas from the well in question if it be a gas well, but (2) its rights in gas from such well if it be an oil well. The case therefore, presents only two ultimate and opposing fact questions; the well is a gas well *or* it is an oil well. It follows that if the Court of Appeals intended to define and adjudicate the nature and extent of Petitioner's legal rights and deny it the relief it sought, *upon a fact finding*, it was incumbent upon it, in the accepted and usual course of procedure (1) to find whether the well was *in fact* an oil well *or* a gas well, and (2) state its legal conclusions based thereon. Accordingly a full,

comprehensive and proper disposition of the case by the Court of Appeals upon a *finding*, rather than upon an *assumption*, of fact required of it, in deference to the rights of Petitioner, an unequivocal statement either approving the finding of the District Court that the well is in fact an oil well or reversing that finding and substituting therefor its own finding that the well is a gas well, and a definite statement of the legal conclusions reached upon the fact so approved or found by it.

On the other hand, if the Court of Appeals intended to leave the fact question undetermined and to dispose of the case solely upon questions of law it was incumbent upon it to consider and expressly determine the respective rights of the parties, as a matter of law, not only upon the hypothesis that the well is a gas well but also upon the hypothesis that it is an oil well. This the Court did not do. It *assumed*, without finding as a fact, that the well was a gas well and decided the case upon that single *assumption*. It expressed no legal conclusions as to Petitioner's right to gas from the well if it be an oil well. It affirmed the judgment of the District Court, apparently without considering Petitioner's right to the relief it sought and its propositions presenting such right in the event such well be an oil well. It made no statement as to its reasons for declining to set out its conclusions with reference to such rights or to pass upon such propositions.

In failing to find as a fact that the well is a gas well or an oil well; in declining expressly to consider Petitioner's rights in gas therefrom if it be an oil well, with no statement as to why such rights were not considered; and, if such rights were considered, in declining to set out its conclusions with respect thereto, the Court of Appeals has deprived Petitioner of specific findings and conclusions to which definite specifications of error might be addressed to this Court for review. In so doing the Court of Appeals deprived this Petitioner of its right

accurately to assign for review before this Honorable Court the findings and holdings of the Court of Appeals upon Petitioner's valuable property rights properly in issue and presented to that court.

In the absence of any statement on the part of the Court of Appeals as to why it did not pass upon Petitioner's asserted rights in gas from the well in question though it be an oil well or as to why it denied plaintiff any relief based upon such rights in the event it did pass thereon, Petitioner is forced to assume that the Court of Appeals either (1) considered that such rights were not in issue and before it, or (2) intended inferentially, by affirming the judgment of the trial court, to hold that if the well be an oil well Respondents *owned the gas* produced therefrom with oil and accordingly Petitioner was without ground for complaint regardless of the relative quantity of gas to oil taken and sold by Respondents therefrom. If the Court thought that the matter was not properly in issue or before it, it should have so announced, stating its reasons therefor. Had it done so, Petitioner could accurately and precisely have presented to this Court for review the correctness of the ruling of the Court in this regard. On the other hand, if the Court intended to hold that Petitioner had no interest in gas produced from the well in question if it produced both oil and gas, such a decision was certainly of such vital importance to Petitioner, to a proper adjudication of the case and to oil and gas jurisprudence as clearly to require the Court to set out its reasons for so concluding in order that its decision might, in due order of procedure, be precisely and accurately presented to this court for review. In short, the Court of Appeals should either have expressly declined to pass upon such rights, stating its reasons therefor, or expressly set out the legal grounds upon which its decision was based. Had it done either Petitioner would not have been deprived of specific findings and conclusions essen-

tial to the exercise of its right of accurate, fair and full review before this Honorable Court; and the effect of the judgment of the Court of Appeals upon Petitioner's valuable property rights in gas from a well drilled by Respondents, and producing both oil and gas, would not be the subject of speculation and uncertainty.

The importance to Petitioner of the implications of such an indeterminate adjudication is clear, and the effect of such judgment may extend beyond the immediate case. Petitioner is the owner of the leasehold gas rights, and Respondents and Houston Oil Company are the owners of the leasehold oil rights in some 1300 acres of land in the immediate vicinity of the well in controversy, all affected by the terms and provisions of the assignment from Houston to Southern Alkali and the contract provisions therein contained. Accordingly if the opinion of the Court of Appeals should be construed, by implication, to hold that if the well in question produces some oil as well as gas, Petitioner has no title to gas therefrom but the Respondents are vested with title thereto, then its effect may and probably will be to adjudicate that Petitioner has no title to or right in gas from *any other well* producing oil and gas drilled by Respondents or Houston on the lands affected by the assignments. Such judgment, if given that effect, will permit the Respondents, and accordingly Houston, to operate any well producing both oil and gas, and completed by them, in any manner they see fit and to take and appropriate the gas therefrom regardless of the relative quantity of gas to oil produced. As a result of such decision, if so interpreted, the gas reserves of Petitioner might and probably will be entirely dissipated. Under the contract provisions referred to, Petitioner can protect its right to gas from a gas well but it cannot do so with respect to a well producing oil and gas for it has no right to take over such a well. It is apparent, we think, that such valuable property rights of Petitioner should

not be left to speculation and doubt nor Petitioner's full right of review before this Court embarrassed by any such uncertainty and indefiniteness of decision by the Court of Appeals.

In its petition for rehearing, Petitioner pointed out the possible effect of the opinion and judgment rendered by the Court of Appeals upon its substantive rights, and requested the court to make specific findings and conclusions with respect to the matters here presented (R. 472). In overruling the Petition for rehearing without further statement, opinion or finding, the Court of Appeals declined such request, thus leaving the rights of the parties to gas from an oil well undetermined except perhaps by implication, with the attendant consequences pointed out above; and the case has been decided on incomplete fact assumptions rather than upon complete findings of fact.

(2) If the Court of Appeals held inferentially (by affirming the judgment of the District Court) that Respondents, Simmons and Webb, owners *only* of the leasehold oil rights, also *own* gas produced with oil from the well in question though the leasehold gas rights in the land from which said well produces are vested in Petitioner, the Court of Appeals has decided a question of particular and outstanding importance to the oil and gas industry, probably untenable and in conflict with the established law, and has decided an important question of local law contrary to the holdings of the Supreme Court of Texas. GUFFEY v. STROUD (Tex. Com. App., opinion adopted, Tex. Sup. Ct.), 16 S.W. (2d) 527.

The question here involved—the determination of the respective rights of the leasehold owner of oil rights and the leasehold owner of gas rights *in gas* from an oil well —is not only of vital importance to the litigants but to the oil and gas industry in general. If, as has been held inferentially by the Court of Appeals, the owner of leasehold

oil rights also owns gas produced from a well completed by him which produces both oil and gas, instead of having the mere right of reasonable user of such gas as a lift of oil, then such owner of the leasehold oil rights, may, upon such holding, entirely dissipate previously vested gas rights and estates. This is true for the reason that if the owner of the leasehold oil rights also owns gas from a well producing both oil and gas, then he may produce, sell and dispose of the gas regardless of the relative quantity of gas to oil produced and without regard to the fact that another is vested with the estate in the gas. Such decision attributes no value to gas and utterly disregards the rights of those vested with title thereto.

At most, owners of leasehold oil rights only, as are Respondents here, have solely a right of user in gas, that is, a right in the nature of an easement to the use of gas as a lift of oil, just as they have the right to the use of surface, water and other essentials to the enjoyment of the oil estate. Such appurtenant right of user no more vests Respondents with ownership of gas than the right of user of the surface and soil vests them with title thereto. Respondents, having only the right of user of gas as an appurtenant to their estate in the oil, must exercise such right reasonably with due regard for the previously vested estate of Petitioner in such gas.

The holding of the District Court, in which the Court of Appeals impliedly acquiesced, that Respondents *owned* the gas produced from such well with oil, with the consequent right to appropriate, sell and dispose of such gas, regardless of the relative quantity of gas to oil produced from said well, is clearly in conflict with the case of GUFFEY v. STROUD, 16 S.W. (2d) 527, by the Texas Commission of Appeals, in which that Court, in an opinion approved by the Supreme Court of Texas, held that the owner of the leasehold oil rights had no title to gas encountered in drilling for oil, but had only the

right to the use of such gas in "*properly*" drilling for and producing oil.

Because of its high gas-liquid ratio or because of the nature of the liquid products, found by the District Court to be "gas-oil" (R. 42), the well in question was reported by Respondents to and by the Railroad Commission of Texas classified as a "gas well producing condensate and/or crude oil" (Exhibits 99-101, R. 427 to 438). The well has at all times been operated as a gas well, the gas therefrom being sold by Respondents Simmons and Webb to Respondent Southern Coast Corporation to be utilized by the latter for the jetting of oil wells and fuel purposes in Corpus Christi Field, an entirely different field from that in which the well is situated. The well having been classified as a gas well, the gas therefrom cannot legally be used as a propelling agency or lift of the oil therefrom and thereafter blown into the air, as might be done had the well been classified by the Commission as an oil well. Instead the well can be operated only for the production of gas, and the liquid products (whether oil or condensates of gas) are but incidental to gas withdrawals.

It follows that Respondents, in operating the well as a gas well and in appropriating and selling the gas to be used for jetting of wells and fuel purposes in another field, are taking from the well in question far more gas than would be legally permitted in the production of oil therefrom. If Respondents are taking more gas from the well than can be *legally* used as a lift of oil therefrom, it must follow that by such excessive withdrawal of gas they are exceeding their right of reasonable use of the gas as a lift of oil. Assuming therefore that the well was upon completion made to produce as much as fifty barrels of oil per day for ten consecutive days by extremely large gas withdrawals and was for that reason an oil well as defined in the contract clauses of the assignment from Houston, it does not follow that

Respondents are making reasonable use of the gas to produce the oil.

Instead they are appropriating and selling the gas for other purposes and obtaining such oil, if any, as the well produces, as an incident to gas production. This they can not do and thus destroy Petitioner's previously vested estate in gas, unless they have title (as distinguished from the right of reasonable user of gas as a lift of oil) to gas from the well. The decision of the Court of Appeals, if construed as inferentially holding to the contrary, is clearly wrong and in conflict with the settled law of Texas as declared in the decision of GUFFEY v. STROUD (Tex. Com. App.), 16 S.W. (2d) 527. Furthermore by the authority of that decision, Petitioner was clearly entitled to an injunction to restrain the appropriation and sale of gas from the well and to judgment in damages for that heretofore taken by Respondents; and the holding of the Court of Appeals that Petitioner is not entitled to such relief is in conflict with the holding in that case.

(3) Petitioner alleged in its complaint (R. 15-21) that Respondents, "Jay Simmons and J. E. Webb, in an unsuccessful effort to produce oil from said land, drilled, and on or about July 5, 1938, completed a well thereon producing and capable of producing great quantities of gas;" and that Respondents are converting large quantities of gas therefrom. Petitioner did not thereby allege the well to be either a gas well or an oil well; it merely alleged, as is uncontradicted in the proof, that the well "is producing and capable of producing great quantities of gas," and sought an injunction restraining appropriation of its property and damages.

In their answer Respondents allege that they are owners of all rights formerly owned by Houston and specifically pleaded in substance that the well in question, if a gas well, was drilled by them in compliance with the contract pro-

visions giving Houston the right to drill five gas wells (R. 24, 25).

Respondent, J. E. Webb, a partner of his corespondent, Jay Simmons, and in charge of the drilling of the well (R. 221), testified upon cross-examination without objection (1) that a good oil well could have been completed in three or four shallower sands, and (2) that Respondents did not discover gas in the well in question "in an unsuccessful effort to complete a commercial oil well" (R. 231-234). This evidence was material only upon the question of whether or not the well in controversy was within the terms of the contract provisions (a matter peculiarly within the knowledge of Respondents); and such evidence was admitted without objection or claim of surprise by Respondents as to proof of fact or as to theory upon which Petitioner was proceeding. There was no claim that any prejudice resulted from the quoted allegation of plaintiff's petition.

Notwithstanding Respondents' confession at the trial that they could have completed the well as a good oil well in any one of three or four shallower sands and that they did not discover gas in the well "in an unsuccessful effort to complete a commercial oil well," the Court of Appeals nevertheless held that Petitioner was precluded because of its *pleading* from asserting the truth of such admission (R. 461).

Such holding is contrary to the intention and meaning of the FEDERAL RULES OF CIVIL PROCEDURE, and is expressly contrary to Rules 15(b) and 54(c) thereof, and is in conflict with other decisions of the Circuit Courts and District Courts with respect thereto. (NESTER v. WESTERN UNION TELEGRAPH CO. (Dist. Ct. So. Dist. Cal.), 25 F. Supp. 478, and authorities cited; FIELD v. WATERMAN STEAMSHIP CORPORATION (C.C.A. 5th Cir.), 104 F. (2d) 849; SWIFT & CO. v. YOUNG (C.C.A. 4th Cir.), 107 F. (2d) 170, 172; ATWATER v. NORTH AMERICAN COAL CORP'N (C.C.A. 2nd Cir.), 111

F. (2d) 125; COLLINS v. METRO-GOLDWYN-MAYER PICTURES CORP'N (C.C.A. 2nd Cir.), 106 F. (2d) 83, 86; BARTIN v. CONNECTICUT GENERAL LIFE INSURANCE CO. (Dist. Ct. Neb. Dist.), 25 F. Supp. 579).

(4) By the contract provisions of the assignment from Houston to Southern Alkali, the former was given the right to complete a gas well only in the event, as a result of its operations, it should discover gas in a well drilled by it *in an unsuccessful effort to complete a commercial oil well.* The importance to both parties of the right of Houston to complete gas wells is clearly indicated by the fact that they were strictly limited to five in number and by the conclusion reached by the Court of Appeals that the products of such five wells should be forfeited by Southern Alkali to Houston in the event Southern Alkali failed to take over such wells. Houston wanted the privilege to complete such wells; Southern Alkali wanted such privilege strictly limited both as to number and conditions upon which they might be completed. Southern Alkali insisted upon such limitations because the forfeiture of the products therefrom to Houston (which might result in the complete exhaustion of its gas reserves) could have been prevented only by paying the cost of drilling and equipping such well to the producing horizon. This being true, it seems clear that the parties contemplated that Houston should not be permitted to complete any well drilled by it as a gas well simply because it had unsuccessfully explored sands below the gas producing horizon in search of oil, but only after it had also unsuccessfully explored sands above as well. In this instance, as shown by the undisputed testimony, Respondents made no effort to complete the well as an oil well in three or more known shallower oil producing sands. In other words, they not only did not discover gas from the well in question in an unsuccessful effort to produce oil, but they willfully completed the well knowing that shallower sands existed in any one of which

they could have completed, but made no effort to complete, a commercial oil well. In this situation, assuming that Respondents were, by assignment, vested with the rights of Houston, they have utterly failed to show compliance with the conditions of the contract by which the title to gas from the well in question, if it be a gas well, should be forfeited by Petitioner to them.

If, in its drilling operations, Houston drilled a well that could be completed either as a commercial oil well or a commercial gas well, the contract provisions of the assignment did not give Houston the privilege of electing to complete it as the one or the other, because its right to complete gas wells was limited to those instances in which gas was discovered *"in an unsuccessful effort to complete a commercial oil well."* It follows that if Houston, in its operations, as was the situation in the instant case, drilled through three or four oil sands, in any one of which a commercial oil well could have been completed, and though one gas sand in which a commercial gas well could have been completed and thereafter prosecuted its drilling operations to a greater depth in an effort to find a more productive oil sand but, due to mechanical difficulties, was unable to complete an oil well at such lower depth, Houston, having closed off the lower part of the hole, would not have the right to elect whether it would perforate the casing in the gas sand and complete the well as a gas well or perforate the casing at one of the shallower oil sands and complete the well as an oil well. The same is true of the rights of Respondents if the rights of Houston were assignable and were assigned to Respondents. Having found oil sands in this well, it was Respondent's duty to leave Petitioner's property undisturbed and to complete the well in one of the shallower oil sands that had been found and drilled through. It follows that the Court of Appeals was clearly wrong in holding that, simply because the drill was

twisted off at a lower depth than that at which the well was completed, the well was completed "in an unsuccessful effort to complete a commercial oil well" and therefore drilled and completed in compliance with the conditions giving Houston the right to drill and complete such well as a gas well and take the products therefrom in the event Southern Alkali failed to take it over.

(5) The contract provision of the assignment from Houston to Southern Alkali, by which Houston was given the right to complete five gas wells was not assignable: (a) Because by the language of such contract provision the right to complete five gas wells was restricted to Houston and was not extended to its "*assigns*" as was true of the correlative right of Southern Alkali to complete oil wells under such contract provision; (b) Because the duty imposed upon Houston to complete five gas wells under the conditions expressed in the contract provision and to permit Southern Alkali to take over such wells by paying the cost *actually incurred* "in drilling and equipping said gas well, exclusive of any overhead charges and exclusive of *any drilling cost below the producing horizon*," conferred special privileges and responsibilities upon Houston, involving its special skill, integrity, credit and responsibility, in reliance upon which Southern Alkali reposed special trust and incurred substantial risk. The Court of Appeals, in holding that such contract right to complete five gas wells was assignable by Houston to Respondents, Simmons and Webb, has decided an important question of general law, particularly affecting the entire oil and gas producing industry, which is probably untenable.

(6) Respondents have only such rights in the 333-acre Harrell tract as passed to them by the assignment from Houston of the leasehold oil rights in a portion of said land. The assignment is limited to the "oil" rights under a portion only of the Harrell lease and a portion of the Lawrence lease,

Houston retaining the oil rights to the remainder of the six leases to which the contract provisions of the assignment of gas rights by Houston to Southern Alkali, dated April 5, 1932, related. The majority holding by the Court of Appeals that the rights of Houston, under the contract provisions of said assignment, to drill not exceeding five gas wells were assigned by it to Respondents Simmons and Webb by the assignment dated January 6, 1938, is incorrect, and in so holding the majority of the Court of Appeals has decided an important question of general law, particularly affecting the entire oil and gas producing industry, which is probably untenable and in conflict with the weight of authority.

(7) The Court of Appeals construed the contract provision of the assignment dated April 5, 1932, as to taking over gas wells by Southern Alkali, merely to afford a simple option right of which time is the essence, rather than as a provision whereby Southern Alkali, or its assigns, as the owner of the gas in place by failure to take over the well would forfeit its title to such gas. On that erroneous construction of the nature of the contract provision as to taking over gas wells, for the sole reason that Petitioner did not offer to take over the well within forty (40) days, the Court of Appeals held that "It is unnecessary to inquire whether the further finding of the District Court was correct, that the option right was waived by Southern and the waiver was converted into an estoppel because Simmons and Webb made contracts and substantial expenditures on the faith of Southern's statement that it did not wish the well." Had the Court of Appeals properly construed the contract as a provision for forfeiture, decision as to questions of waiver and estoppel, and as to whether forfeiture resulted from such facts, would have been required because the equitable rules governing questions of forfeiture impose the burden of proof

upon the party asserting the forfeiture to have occurred; and the rule as to simple options, upon which the court based its opinion, would not have been applicable. Accordingly, the Court of Appeals has held that Petitioner has forfeited its valuable property rights in gas in place upon inapplicable and erroneous rules of construction and has decided an important question of general law probably untenable and in conflict with the weight of authority, and an important question of local law contrary to a decision of the Supreme Court of Texas as expressed in JONES v. GIBBS, 133 Tex. 627, 130 S.W. (2d) 268, and at variance with and contrary to a decision of the Circuit Court of Appeals for the Tenth Circuit as expressed in GLOYD v. MID-WEST REFINING COMPANY, 62 Fed. (2d) 483.

Prayer for Writ

WHEREFORE, Petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, commanding said Court to certify and send to this Court on a day certain to be named therein, a full and complete transcript of the record and the proceedings had in said Court in the case numbered and entitled on its docket No. 9183, SOUTHERN MINERALS CORPORATION, APPELLANT v. JAY SIMMONS, ET AL., APPELLEES, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States and that the judgment of the Circuit Court of Appeals and of the District Court be reversed by this Court and judgment rendered for Petitioner granting the injunction and damages as prayed, or in the alternative, that the cause be remanded to the Circuit Court of Appeals for a more complete statement of the facts as found by that Court and conclusions

upon which its judgment was based, and for such other relief as to this Honorable Court may seem right and proper.

DATED this 5th day of September, A.D. 1940.

SOUTHERN MINERALS CORPORATION,
BY BIRGE HOLT,
Corpus Christi, Texas;
BY DAN MOODY,
Austin, Texas;
BY RALPH R. WOOD,
Houston, Texas.
Counsel for Petitioner

By: John Moody
Of Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.....

SOUTHERN MINERALS CORPORATION, *Petitioner*,

v.

JAY SIMMONS, ET AL., *Respondents*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

I.

Opinions of the Courts Below

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 455), is reported in 111 F. (2d) 333. The judge before whom this cause was tried in the United States District Court for the Southern District of Texas, wrote no formal opinion but filed findings of fact and conclusions of law (R. 33-46).

II.

Jurisdiction

A statement of the grounds on which the jurisdiction of this Honorable Court is invoked is set forth in the preceding Petition under heading II (pp. 8-9) and are hereby adopted and made a part of this brief.

III.

Statement of the Case

A statement of the case has been made in the preceding Petition under heading I (pp. 2-8) and is hereby adopted and made a part of this brief.

IV.

Specifications of Error

1. The Court of Appeals erred, particularly upon Petitioner's timely request therefor in its Petition for rehearing, in failing specifically and expressly (a) to find, *as a fact* essential to a full and correct determination of the case and the property rights of the parties in issue (instead of *assuming* as a fact for the purpose of disposing of the questions of law expressly considered by it) that the well in question is a gas well as described in the assignment from Houston Oil Company to Southern Alkali, or (b) to set out its conclusions with respect to the rights and titles of Petitioner and Respondents in gas from such well in the event it assumed or found, as did the District Court, that the well in question was an oil well as defined in such assignment.

2. The Court of Appeals erred in holding, inferentially, that if the well in question be an oil well, Respondents

Simmons and Webb are vested with title to gas produced from such well.

3. The Court of Appeals erred in holding that Petitioner was precluded from contending that Respondents had not complied with conditions of the contract provisions in the assignment from Houston to Southern Alkali under which the title to products of five gas wells might be forfeited to Houston, simply because Petitioner had alleged that the well was drilled by Respondents "in an unsuccessful effort to produce oil."

4. The Court of Appeals erred in holding that Respondents Simmons and Webb, by "drilling" the well in question "beyond the gas strata," in which it was completed, "in a search of oil still lower," complied with the condition of the contract provisions of the assignment from Houston to Southern Alkali giving Houston the right to complete a gas well and take the products thereof upon failure of Southern Alkali, or its assigns, to take the well over.

5. The Court of Appeals erred in holding that the contract rights of Houston Oil Company under the assignment from it to Southern Alkali Corporation, dated April 5, 1932, with respect to five gas wells were assignable by Houston Oil Company.

6. The majority of the Court of Appeals erred in holding that the contract rights of Houston Oil Company under the assignment from it to Southern Alkali Corporation, dated April 5, 1932, with respect to five gas wells were intended to be, and were, assigned by Houston Oil Company to Respondents Simmons and Webb by the assignment dated January 6, 1938.

7. The Court of Appeals erred in holding that the rights of Petitioner under the contract provisions of the assignment

by Houston to Southern Alkali defining Petitioner's right to take over a gas well drilled by Houston to be governed by rules relating to simple options of which time is the essence, placing upon Petitioner the burden of showing that it had exercised the option within the time provided rather than in accordance with the rules relating to forfeitures under which the burden is placed upon Respondents of showing strict compliance with all prerequisites to accomplish such forfeiture.

V.

ARGUMENT

Summary of Argument

POINT 1. Since Petitioner's right to the gas from the well, whether it be an oil well or a gas well, was in issue and before the court, it was the duty of the Court of Appeals, particularly upon timely request of Petitioner in its Petition for Rehearing, to find as a fact whether the well is an oil well or a gas well and declare the rights of the parties upon the basis of such finding. Or, if the court proposed to dispose of the case on the basis of assumptions of fact, as distinguished from findings of fact, then the court should have declared the rights of the parties not only upon the hypothesis that the well is a gas well but also upon the hypothesis that the well is an oil well. Anything less, as for example the court's attempt to decide the case upon the one hypothesis that it is a gas well, results in failure fully to adjudicate the rights of the parties and leaves such rights in confusion and doubt and deprives the parties of specific findings and conclusions to which they may assign error upon appeal to this Court for review.

POINT 2. Petitioner owns the leasehold gas rights; Respondents own only the leasehold oil rights. Respondents, as

owners of the leasehold oil rights only, do not *own* gas produced from a well completed by them producing both oil and gas, but have, at most, only a usufructuary right in the gas from such a well, that is the right to make reasonable use of such gas as a lift of the oil therefrom. In appropriating and selling the gas off the premises Respondents are far exceeding their rights of reasonable user.

POINT 3. Respondent Webb testified that the discovery of gas in the well in question was not the result of "an unsuccessful effort to complete a commercial oil well" but that a good producing oil well could have been completed in any one of three or four shallower sands. In view of this testimony and the express provisions of Rules 15(b) and 54(c) of the FEDERAL RULES OF CIVIL PROCEDURE, under which this case was filed and tried, Petitioner was not precluded, by its pleading, from contending that in respect to the well in question Respondents had not complied with the contractual provisions of the assignment from Houston to Southern Alkali giving Houston the right to complete a gas well and own the products therefrom in the event Southern Alkali failed to take the same over.

POINT 4. Respondents did not, simply by drilling in search of oil to lower depths than that in which the well in question was completed, comply with the conditions of the contract provision of the assignment from Houston to Southern Alkali giving Houston the right to complete such well as a gas well and take the products therefrom in the event Southern Alkali, or its assigns, failed to take the well over. Such contract provisions do not give Houston the alternate right to complete any well drilled by it as either a gas well or an oil well but gives it the right to complete a well drilled by it as a gas well only in the event such well cannot be completed as a commercial oil well.

POINT 5. The rights of Houston with respect to gas wells which it might complete (up to five in number), under the contract provisions of its assignment to Southern Alkali, were not assignable by Houston to Respondents Simmons and Webb.

POINT 6. The assignment from Houston to Respondents Simmons and Webb, dated July 6, 1938, did not assign or convey the rights of Houston under the contract provisions of its assignment to Southern Alkali with respect to gas wells (up to five in number) drilled and completed by Houston.

POINT 7. The contract provisions as to taking over gas wells by Petitioner provide a forfeiture and the rights of the parties should have been determined in the light of the rules governing forfeiture rather than the rules governing simple options.

POINT 1

Court of Appeals' Decision Based Upon Assumption Rather Than Finding of Fact Made by District Court

As Petitioner has pointed out in its Petition for Writ of Certiorari (Reason 1, p. 11), it was the duty of the Court of Appeals to *find as a fact* that the well in question is an oil well *or* a gas well; or, if it intended to dispose of the case upon questions of law, to announce its legal conclusions as to Petitioner's rights in gas therefrom not only upon the hypothesis that it is a gas well but also upon the opposite hypothesis that it is an oil well. The Court of Appeals announced its conclusions upon the single *assumption* that the well is a gas well. It did not consider Petitioner's rights in gas from such well upon the opposite hypothesis that the well is an oil well nor express its reasons for not considering such rights; or, if it did consider such rights it failed to set out its con-

clusions with respect thereto. The Court of Appeals' failure in this regard could have been justified only upon the ground that such rights were not in issue or before the court.

By its complaint, upon which the case was tried, Petitioner, without alleging whether the well is a gas well or an oil well, but alleging its ownership of the gas in place, sought to enjoin the appropriation and sale of gas therefrom by Respondents as a continuing trespass upon its real property right and estate therein and to recover damages for gas and liquid products of gas theretofore taken and converted by Respondents (R. 15-21); it sought such relief whether the well be an oil well or a gas well.

To this Respondents answered (R. 23), (1) that the well is an oil well and that Respondents own and accordingly have the right to appropriate and sell gas produced therefrom with oil; (2) but in the alternative, if the well is a gas well, Respondents are entitled to all the products thereof (R. 24, 25).

The rights of Petitioner in gas from the well in question, if it be an oil well, were therefore clearly in issue. That such rights were properly before and considered by the District Court is shown by the announced legal conclusions of that court with respect to Petitioner's right to the relief it sought not only (1) upon the *assumption* that the well is a gas well, but (2) also upon the *finding* of fact that it is an oil well. No claim has ever been made by Respondents that if Petitioner were entitled, upon the facts proven, to injunction and damages, it should be denied such relief because of any deficiency in the pleading. This being true, Petitioner was entitled to such judgment as the proof warranted, regardless of the state of the pleading. Rules 15(b) and 54(c), FEDERAL RULES OF CIVIL PROCEDURE.

Such rights were likewise properly before and presented to the Court of Appeals by appropriate specification and proposition (Petitioner's Brief, Court of Appeals, pp. 150, et seq.), to which Respondents replied by counter-propositions

(Respondents' Brief, Court of Appeals, pp. 148-204), without the remotest suggestion that Petitioner was changing the theory from that upon which it has proceeded in the court below or that its rights to gas from the well in question if it be an oil well were not in issue or properly before the Court of Appeals.

In this state of the case, it was clearly the duty of the Court of Appeals to consider Petitioner's rights with reference to gas from the well in question, though it be an oil well and to set out its conclusions with respect thereto, or expressly to state why it had not considered such rights. Only by so discharging its duty could the Court of Appeals avoid the uncertainties resulting from the judgment rendered by it or protect Petitioner in its right of full review before this Honorable Court of the holdings of the Court of Appeals upon vital and material questions in issue and properly presented to that court for its consideration. RAILROAD COMMISSION v. MAXCY, 281 U.S. 82, 83; PANAMA MAIL SS. Co. v. VARGAS, 281 U.S. 670, 671; PUBLIC SERVICE COMMISSION v. WISCONSIN TELEGRAPH Co., 289 U.S. 67, 69, 70; UNITED STATES v. MAGNOLIA PET. Co., 276 U.S. 160, 165; OKLAHOMA REF. Co. v. SEVENRNS PAVING Co., 251 U.S. 104, 107; MARYLAND CASUALTY Co. v. JONES, 279 U.S. 792; LITTLE MIAMI COL. & S. R. Co. v. UNITED STATES, 108 U.S. 277; LUTCHER & MOORE LBR. Co. v. KNIGHT, 217 U.S. 257.

POINT 2

Even If Well Is an Oil Well, Respondents Do Not Have Title to Gas Therefrom But Only Usufructuary Right in Such Gas

The District Court found as a fact that the well in question is an oil well (R. 41, 42, 45 and 46). Upon such finding

the court held that Respondents were *owners* of gas produced from such well with oil, basing such holding upon the following conclusions:

> (1) That Houston in its assignment to Southern Alkali "reserved" the gas rights "appurtenant" to the right to drill and produce oil and the gas coming from said oil well is appurtenant and necessary to the production of oil (FF(11), R. 43) and consequently the gas produced and sold by Respondents was "*appurtenant* to the oil rights" and a part of the gas rights *retained* by Houston and assigned to Respondents; that accordingly Respondents *owned* the gas from such well (Concl. V, R. 45), and
>
> (2) That in its assignment to Southern Alkali, Houston "*reserved* the gas rights appurtenant to the right to drill and produce oil and *reserved* the gas rights appurtenant to the ownership of the oil rights as expressly provided for in the original lease from Harrell and wife to Kelly, which provides:
>
> > " 'Lessee shall have free use of oil, gas, wood and water from said land except water from Lessor's wells for all operations *hereunder*, and the royalty on oil and gas shall be in the net quantity after deducting any so used for operation' (Ex. 'A,' R. 388);"
>
> and that such appurtenant rights were assigned by Houston to Respondents Simmons and Webb and that they *owned* the gas produced from such well (Concl. VI, R. 45, 46).

A simple question should be sufficient to demonstrate that the trial court was in error and that Respondents do not own gas produced with the oil from an oil well. The question is: If Petitioner, as owner of the gas rights, should drill a well cap-

able of producing large quantities of gas and relatively small quantities of oil, would Petitioner thereby, under the terms of its assignment, acquire title to the oil produced with the gas as against Respondents, the owners of the oil rights? Obviously, the answer is no. Petitioner owns the gas rights by assignment under the original lease; Respondents own the oil rights by assignment under the original lease. Respondents do not hold any title in Petitioner's property, as Petitioner does not own any title in Respondents' property. The oil belongs to Respondents, whoever may produce it; the gas belongs to Petitioner, whoever may produce it.

By the oil and gas lease from Harrell and wife to Kelly, the latter, as lessee, under the law as established in Texas, became vested with title to oil and gas in place, as real estate, in the Harrell land. (SIGLER OIL CO. v. W. T. WAGGONER EST., 118 Tex. 509, 19 S.W. (2d) 27; STEPHENS COUNTY v. MID-KANSAS OIL & GAS CO., 113 Tex. 160, 254 S.W. 290; SHEFFIELD v. HOGG, 124 Tex. 290, 77 S.W. (2d) 1021.) No change in such vested title results from the act of producing or because of change of form from gas to liquid as a result of production (LONE STAR GAS CO. v. STINE (Tex. Com. App.), 41 S.W. (2d) 48; HUMBLE OIL & REF. CO. v. POE (Tex. Com. App.), 29 S.W. (2d) 1019-1020; REYNOLDS v. MCMANN OIL & GAS CO. (Tex. Com. App.), 11 S.W. (2d) 778; AMERICAN REF. CO. v. TIDAL WESTERN OIL CORP. (Tex. Civ. App., w. e. ref.), 264 S.W. 335). Such estate as to gas was assigned and conveyed by Houston to Southern Alkali and by Southern Alkali to Petitioner and Petitioner thereby was vested with title to gas in place in the land.

From neither of such assignments was any portion of the gas in and under the land and that might be produced therefrom excepted or reserved, except perhaps gas from five gas wells which Houston might complete under the terms of the contract provisions of the assignment from it to Southern Al-

kali and which Southern Alkali, or its assigns, failed to take over. Such exception or reservation, if such it be, cannot be extended by implication to gas from oil wells which Southern Alkali and its assigns had no right to take over; nor implied to defeat in whole or in part the express grant of gas to Petitioner. (KOENIGHEIM v. MILES, 67 Tex. 213, 2 S.W. 81; SETTEGAST v. FOLEY BROS., 114 Tex. 452, 270 S.W. 1014; JONES v. SUN OIL CO. (Tex. Civ. App.), 110 S.W. (2d) 80, w. e. ref.) It follows, therefore, that if the well is an oil well as defined in the contractual provisions of the assignment from Houston to Southern Alkali, Petitioner being vested with title to gas in place and when produced at the surface from such well, Respondents do not own or have title to gas produced therefrom with oil, and a decision of the case is not dependent upon a construction of instruments but upon established local law.

Since no right, title or interest in the gas was by express or implied reservation, exception or limitation retained by Houston nor assigned by it to Respondents, any right Respondents may have in the gas arises of necessity by implication as an appurtenant to their leasehold estate in the oil. Since gas associated or blended with oil in production of an oil well is a propelling agency of the oil, Respondents have by implication, and as an appurtenant to their estate in the oil, the right (in the nature of an easement) of *user* of such gas as a lift of the oil just as they have the implied and appurtenant right of user of the surface, water an soil. However, Respondents clearly are not, by virtue of such right of user, vested with title to gas produced from a well also producing oil, no more than they are vested with title to the surface and soil simply because of their implied right of user thereof as an incident or appurtenant to their enjoyment of their oil estate.

This was the holding of the Texas Commission of Appeals,

with the approval of the Texas Supreme Court, in the case of GUFFEY v. STROUD, 16 S.W. (2d) 527, 64 A.L.R. 730. In that case the court had before it the respective rights of the owners of an oil lease and the owner of a gas lease on the same tract of land. There the leasehold estates in the gas and in the oil were established by two separate leases. The Harrell lease under which the rights of both Petitioner and Respondents are derived was assignable in whole or in part, and the estate of Petitioner in the gas and of Respondents in the oil was accomplished by assignment of leasehold gas rights to the one and leasehold oil rights to the other, in consequence of which, just as in the case of GUFFEY v. STROUD, Petitioner owned the leasehold estate in the gas and gas rights in the land and Respondents the leasehold estate in the oil and oil rights in the land, each holding as appurtenances to their respective estates such rights of user as were reasonably necessary for them respectively to enjoy the estates owned by them.

In that case the court defined the rights of the owner of the leasehold oil rights in the gas as follows:

> "The right to take oil carried with it *by implication* the right to tap gas pockets and *to bring to the surface* so much of the gas as was necessary in the *proper drilling for oil*. The grant of the oil carried with it *a grant of the way, surface, soil, gas and the like essential to the enjoyment of the actual grant of the oil*. It cannot be said that all use of or interference with the gas in place was wrongful as against defendant in error.
>
> "But the well having been a failure as an oil well, plaintiffs in error have no right to use it as a means or permit it as an occasion for the taking of defendant in error's gas." (Emphasis ours.)

That the court in GUFFEY v. STROUD did not intend to and did not hold that the grant of the oil carried with it ownership of gas produced with oil but only the right of user thereof,

is clearly shown by its holding (1) that the right to take the oil carried with it, *"by implication,"* the right to tap gas pockets and to *"bring to the surface"* only "so much of the gas as was necessary in the *proper* drilling for oil" and (2) by its defining the oil owner's right in the "gas" to be of the same character as its right of "way, surface, soil and water * * * and other *like essential to the enjoyment of the actual grant of the oil.*" In other words the court's opinion is subject only to the interpretation that the owner of the oil had a right in the nature of an easement in such amount of gas as was essential to the enjoyment of the oil estate, i. e., as "was necessary in the *proper* drilling for" and, by implication, producing of oil. The case has been so interpreted by SUMMERS, "Oil & Gas," Perm. Ed., Sec. 652, in which the author states:

> "And if the lease grants only the oil, the lessee *may not market* gas which he discovers, although he has an implied right *to use* such gas for drilling purposes despite the fact that another has a gas lease covering the same land * * * " (Emphasis ours.)

The right of user of gas as a lift must upon elemental principle be reasonably and properly exercised just as the right of user of surface, water and other appurtenant rights must be so exercised with due regard for the title and estate of the Petitioner in such gas (SUMMERS, "Oil & Gas," Perm. Ed., Vol. 4, p. 2, Sec. 652; COZART v. CRENSHAW (Tex. Civ. App.), 299 S.W. 499; SHELL PET. CORP'N v. LIBERTY GRAVEL & SAND CO. (Tex. Civ. App.), 128 S.W. (2d) 471.

That the oil owner's right of user of gas is not an unqualified one is clearly held in GUFFEY v. STROUD, when due consideration is given to the following language of the court:

> "The right to take oil carried with it *by implication* the right to tap gas pockets and *bring to the surface* so much of the gas as was necessary in the *proper drilling for,*" and by implication, production of oil.

And further:

> "But the well *having been a failure as an oil well, plaintiff in error has no right to use it as a means or permit it as an occasion for taking defendant in error's gas.*" (Emphasis ours.)

The court does not further define the word "proper." It may be said with confidence, however, that a "proper" amount of gas could not exceed that which might be *legally* used as a *lift* in the production of oil.

The classification of the well as a gas well by the Railroad Commission of Texas established as a matter of law that the gas from such well could not be used as a *lift* of the oil. Instead, the well being so classified could be operated only for the production of gas which was required to be utilized for light, fuel or other permitted purposes to which gas from gas wells might be put (TEX. REV. CIV. STATS. Art. 6008, Secs. 3 and 7, Appendix A and Art. 6014, Appendix B; CLYMORE PRO. CO. v. THOMPSON, 11 Fed. Sup. 791, 13 Fed. Supp. 469; F. C. HENDERSON, INC., v. RAILROAD COMMISSION OF TEXAS, 56 F. (2d) 218). The liquid obtained from the well was but incidental to the production of gas. Accordingly, Respondents in operating the well in question as a gas well were taking therefrom more gas than might be *legally* taken and, hence, *reasonably* used, as against the right of Petitioner, as a *lift* of the liquid products of the well.

Nor can Respondents operate the well as a gas well and appropriate, sell and dispose of the gas upon the ground that since they cannot operate their well as an oil well (because of its high gas-liquid ratio) it is "necessary" for them to operate it as a gas well and sell and dispose of the gas in order to obtain their oil. It would indeed be the assertion of a strange doctrine that one owner has the right to destroy the property and estate of another in order to recover his own,

particularly where his estate has been acquired subsequent and subject to the estate of the other.

In the words of GUFFEY v. STROUD, supra, "the well having been a failure as an *oil well,*" Respondents "have no right *to use it as a means or permit it as an occasion for taking*" Petitioner's gas.

Nor was a "reservation" of "ownership of the gas" produced from such well accomplished by the socalled "free use" clause in the original lease, under the terms of which the lessee was given the right *as against the lessor* to use *on the premises* free of cost, gas, oil and water produced on said land for *its operations thereunder.* It was the express purpose of this clause, which is a customary one in the usual form of oil and gas lease, to give the lessee the right to use gas in well and lease operations upon the leased land without the necessity of paying royalty on the gas so used in such operations. Upon the severance, by assignment, of the leasehold gas estate from the oil estate, the owner of the gas estate and the owner of the oil estate each was entitled to the benefits of such provision. Such clause does not seek to provide for the respective rights of the owner of the leasehold oil rights and the owner of the leasehold gas rights, between themselves, in the use of gas. It may be said with certainty, therefore, that Respondents, as owners of the oil rights, if they have the right to use of gas in conducting *operations under the lease and on the land in question,* do not have such right, as against Petitioner, by virtue of such clause but as an appurtenant right to the enjoyment of the estate in the oil owned by them. It is unnecessary, however to determine this question here, for even if the defendants, as owners of the oil rights, were entitled, under such free use clause, to use gas produced by them from such land for operations they might properly conduct on the leased premises under said lease, the gas is not being so used for any such permitted operation *but is being transported from the prem-*

ises and used and sold for fuel and jetting of wells in Corpus Christi Field. To such use and sale and operation the free use clause clearly has no application. ARMSTRONG, ET AL., V. SKELLEY OIL CO., 55 F. (2d) 1066.

As heretofore stated, gas in place is real property in Texas. Petitioner is owner of the gas in place, subject alone to Respondents' implied right to use such amount of gas as might be legally used as a lift of oil. Respondents, as heretofore shown, were, therefore, without right as against Petitioner to operate the well as a gas well and use and dispose of the gas therefrom for jetting of wells or fuel purposes in Corpus Christi Field, an entirely different field, for the reason that such exceeded their right of user as against the Petitioner. It accordingly constituted a trespass upon Petitioner's real property right in gas, because of which Petitioner was entitled upon equitable principles (14 R. C. L. 443-445; 32 C. J. 139, 140), as well as by Statute in Texas (Art. 4642, REV-CIV. STATS., 1925, Appendix C) to have such operation of the well and appropriation, use and sale of its gas restrained by injunction. GUFFEY V. STROUD (Tex. Com. App.), 16 S.W. (2d) 527; MILLER LINK LUMBER CO. V. STEPHENSON (Tex. Com. App.), 265 S.W. 215, affirmed (Tex. Sup. Ct.) 277 S.W. 1039; ERHARDT V. BOARO, ET AL., 113 U.S. 537; HOUSTON OIL COMPANY OF TEXAS V. VILLAGE MILLS CO., 109 Tex. 169, 202 S.W. 725. As stated in SUMMERS' "OIL AND GAS," Perm. Ed., Vol. 1, p. 70, Sec. 28:

> "Landowners or persons having separate estate in oil and gas have been allowed in numerous cases injunctive relief against trespassers actually taking or threatening to take oil and gas." (Citing numerous cases, Note 92.)

Petitioners, of course, are entitled to damages for gas and condensates of gas heretofore converted and appropriated by them from such well.

Nor is the question here one of regulation of which the Railroad Commission of Texas would have jurisdiction as concluded by the District Court. The basic substantive question presented is whether Respondents own the gas from such well or have only the right of reasonable user. This question is obviously one of title over which clearly the Railroad Commission of Texas is utterly without jurisdiction. ALTGELT v. TEXAS CO. (Tex. Civ. App.), 101 S.W. (2d) 1104 (w. of e. dis.); RAILROAD COMMISSION v. LAMB (Tex. Civ. App.), 81 S.W. (2d) 161; TIDE WATER OIL CO. v. RAILROAD COMMISSION (Tex. Civ. App.), 76 S.W. (2d) 553; RAILROAD COMMISSION v. RAU (Tex. Civ. App.), 45 S.W. (2d) 413. No question of conservation is raised.

POINT 3

Petitioner Not Precluded by Pleading From Contending Respondents Had Not Complied With Condition Giving Houston Right to Drill Gas Well

The Court of Appeals held (R. 461):

> "Southern's State court suit, and also that before us, alleged that Simmons and Webb completed the well 'in an unsuccessful effort to produce oil.' *This being true,* the second part of the working agreement, * * * required that the well be completed by them as a gas well."

Actually Petitioner alleged "that defendants, Jay Simmons and J. E. Webb, in an unsuccessful effort to produce oil from said land, drilled, and on or about July 5, 1938, completed a well thereon producing, and capable of producing, great quantities of gas" (R. 15, 16).

Respondent, J. E. Webb, a partner of his corespondent, Jay Simmons, testified:

"Q. Well, you couldn't drill that hole any further than your 6600 where you twisted off, could you?
A. I made up my mind that I didn't want to try to get any deeper after having so much trouble.
Q. Then you concluded to abandon that and bring the well in at the depth which you did bring it in?
A. There are three or four sands you can make a good producing well at.
Q. What kind of well?
A. Oil wells.
Q. At a shallower depth than the 5800 horizon?
A. Yes.
* * *
Q. Did you discover gas in this well in an unsuccessful effort to complete a commercial oil well?
A. I did not" (R. 231-234).

and:

> "We topped that sand around 5784 and went out of it below 5800, and after we had encountered the first three or four feet of the sand it was completely saturated from the gasoline, and upon removing some above the core barrel, which I had taken out to a tool shed I had on the lease for that purpose, I took samples of the core and squeezed them between my hands and gasoline ran out of the cores, and I left them in the core house and it remained in that condition several days until the atmosphere completely dried the sand out" (R. 233).

That testimony stands uncontradicted and proves that it is *not* "true" that this well was completed in compliance with the contract right of Houston Oil Company to complete not exceeding five gas wells, and proves that it is "true" that Respondents knew the 5800-foot sand at which the well was completed to be a gas sand, and "knew" the well could have been completed as an oil well at a shallower sand, but nevertheless deliberately completed it in the gas sand.

The holding by the Court of Appeals that solely because of its pleading and regardless of the uncontradicted proof in the case Petitioner is precluded from insisting upon decision by the court whether the well is such gas well as Houstion Oil Company was given the right to complete, and that Petitioner has, therefore, because of such pleading, forfeited any right in gas from the well in question, is directly contrary to the theory of pleading on which the FEDERAL RULES OF CIVIL PROCEDURE were designed and adopted. (Proceedings of the American Bar Association Institute at Cleveland, pp. 219-224.)

Such holding is in direct contravention of Rule 15(b):

> "AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. * * * "

and Rule 54(c):

> " * * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Such holding also is in conflict with other decisions of other Circuit Courts and District Courts with respect thereto. (NESTER v. WESTERN UNION TELEGRAPH CO. (Dist. Ct. So. Dist. Cal.), 25 F. Supp. 478, and authorities cited; FIELD v. WATERMAN STEAMSHIP CORPORATION (C.C.A., 5th Cir.), 104 F. (2d) 849; SWIFT & CO. v. YOUNG (C.C.A. 4th Cir.),

107 F. (2d) 170, 172; COLLINS v. METRO-GOLDWYN-MAYER PICTURES CORP'N (C.C.A. 2nd Cir.), 106 F. (2d) 83, 86; ATWATER v. NORTH AMERICAN COAL CORP'N (C.C.A. 2nd Cir.), 111 F. (2d) 125; BARTIN v. CONNECTICUT GENERAL LIFE INSURANCE CO. (Dist. Ct., Neb. Dist.), 25 F. Supp. 579).

The Court of Appeals, therefore, having erroneously deprived Petitioner of very substantial property rights upon a technical construction of pleading, and in disregard of the uncontradicted proof, in justice such decision should be reversed and the holding should be made in accordance with the uncontradicted proof that the well is not such gas well as was required to be completed by the owner of the oil rights in said land.

POINT 4

Well in Question Not Drilled by Respondents in Compliance With Conditions Giving Right to Houston to Drill Gas Well and Take Products

Assuming the well in question to be a gas well the Court of Appeals held that Petitioner having failed to exercise its option to take the well over, Respondents had the implied right under the contract provisions of the assignment from Houston Oil to Southern Alkali to take all the products therefrom. Since Petitioner was vested with title to gas in place and upon production, it is clear that the effect of the court's holding was that Petitioner, by failure to exercise its option, had forfeited to Respondents its title to so much of the gas as might be produced from the well in question. Such being the case it was necessary for Respondents strictly to comply with the conditions of the contract provision giving Houston the right to drill gas wells before they could complete the well in question as a gas well, and take the gas there-

from for failure of Petitioner to take it over. (JONES v. GIBBS, 133 Tex. 627, 130 S.W. (2d) 265, 268; GLOYD v. MID WEST REF. CO., 62 F. (2d) 483). Stated differently Respondents had no right to complete the well in question as a gas well and force Petitioner to take it over under penalty of forfeiture of all its products until compliance with all the conditions giving rise to such right were plainly shown.

The contract provision of the assignment from Houston to Southern Alkali gave the former the right to complete a gas well only in the event Houston, "as a result *of its operations,* discovered gas in any well drilled" by it "in an *unsuccessful effort to complete a commercial oil well*" (R. 389, 395). In other words, Respondents were permitted to complete a gas well only if the well could not be completed as an oil well. That the right was to be a limited and special right and privilege is sufficiently indicated by the following stipulation of the contract:

> "Provided, however, it is distinctly understood and agreed that the Houston Oil Company of Texas shall not have the right or privilege of completing more than five (5) such gas wells" (R. 395).

By their own confession Respondents (1) could have completed a good oil well in three or four shallower sands (R. 231-234), and (2) they did not complete the well "in an unsuccessful effort to complete a commercial oil well" (R. 231-4). Having failed to comply with the conditions giving them the right to complete the well in question as a gas well—they had no right to take its products upon Petitioner's failure to take it over. This being true it is manifest that Petitioner was entitled to injunction and damages. The decision of the Court of Appeals to the contrary is clearly wrong.

POINT 5

Rights of Houston to Gas Wells Completed By It Not Assignable

The terms of the agreement as to completing five gas wells evidence the intention of the parties that such right should be personal to Houston Oil Company and not assignable. BURCK v. TAYLOR, 152 U.S. 634.

The contract provision of the assignment by Houston Oil Company to Southern Alkali Corporation dated April 5, 1932, with respect to oil wells expressly extends to Southern Alkali Corporation, or its assigns, but the use of the word "assigns" is wholly absent from the provision as to gas wells not exceeding five in number that could be completed by Houston Oil Company.

The use of the word "assigns" has been held by the Texas courts to indicate an intention that the contract may be assigned. PHILLIPS v. OIL, INC. (Tex. Civ. App.), 104 S.W. (2d) 576; GOODLOE & MEREDITH v. HARRIS, 127 Tex. 583, 94 S.W. (2d) 1141, Tex. Civ. App. 58 S.W. (2d) 156.

Conversely, the absence of the word "assigns" evidences the intention that the contract not be assignable. HILLMAN v. SHANNAHAN, 18 Am. Rep. 281; 4 AM. JUR. 236.

Furthermore, the contract provision with regard to completing gas wells, not exceeding five in number, necessarily involved the skill, integrity, credit and responsibility of Houston Oil Company and personal trust and confidence in that company. Such a contract is not assignable. ARKANSAS SMELTING COMPANY v. BELDING MINING COMPANY, 127 U.S. 379; AMSCO PIPE LINE COMPANY v. DONICO PRODUCTION CO. (Tex. Civ. App.), 112 S.W. (2d) 483, writ dismissed; MENGER v. WARD (Tex. Sup.), 30 S.W. 853; SMITH v. PITTS (Tex. Civ. App.), 122 S.W. 46; DITTMAN v. MODEL BAKING COMPANY (Tex. Com. App.), 271 S.W. 75; MAG-

NOLIA PETROLEUM COMPANY v. HAVOLINE AUTO SUPPLY Co. (Tex. Civ. App.), 172 S.W. 759; FOSTER v. CALLAHAN & Co., 248 F. 944; DEMAREST v. DUNTON LBR. Co., 161 F. 264; 6 CORPUS JURIS SECUNDUM, p. 1076.

Factors of such personal trust and confidence reposed in the skill, integrity, credit and responsibility of Houston Oil Company include: provision for actual cost to the producing horizon exclusive of overhead and drilling costs below the producing horizon, and keeping record thereof; reliance upon Houston Oil Company to use machinery and drilling equipment adequate to safely complete and equip a gas well, gas being an inflammable, explosive and dangerous element; confidence in the integrity and reliability of Houston Oil Company not to complete a gas well unless such well could not be completed as an oil well; and willingness to pay to Houston Oil Company its actual cost of drilling and equipping a gas well because of reliance on the skill and ability of Houston Oil Company to drill and equip such well at an actual cost that would be the proper cost of such an operation.

POINT 6

Right of Houston Oil Company to Complete Gas Wells Not in Fact Assigned By It to Respondents Simmons and Webb

The right of Houston under the contract provisions of its assignment to Southern Alkali to complete five gas wells was clearly not a right appurtenant to, nor essential to the enjoyment of, the oil estate retained by it nor a covenant which without express words of grant would ordinarily pass by an assignment of such oil estate. It is a special contract provision relating alone to five gas wells and to the products thereof. It follows of course, therefore, that the granting clause of the assignment covering only "*oil rights* under said existing

leases," was a limited and special grant and would not pass the rights of Houston under such contract provisions unless some other language of the assignment required such construction (BRITTON v. COTTON STATES PET. CO. (Tex. Civ. App.), 283 S.W. 887; DORRIS v. SULLIVAN, 90 Cal. 27, 27 Pac. 216; PIPER v. UNION PACIFIC RY. CO., 14 Kan. 568).

The assignment by Houston Oil Company to Respondents Simmons and Webb, dated January 6, 1938 (R. 399), conveyed only oil rights under portions of the Harrell and Lawrence leases, which in turn, were two of six leases covering 1300 acres in which Houston had theretofore, on April 5, 1932 (R. 389), assigned to Southern Alkali and its assigns, the gas rights. The controlling terms of the assignment to Simmons and Webb (R. 399, 464) are these:

> "Whereas, First Party is the owner of the *oil rights* under an oil and gas lease from Dr. T. M. Harrell and wife to R. D. Kelley, * * * ; and, Whereas, First Party is the owner of the *oil rights* under an oil and gas lease from L. S. Lawrence and wife, R. M. Lawrence and wife, and T. M. Harrell and wife, to R. D. Kelley, * * * "; it is the intention "of this instrument for First *Party* to assign to Second Parties the *oil rights* under said existing leases in so far as they cover a portion of the above described lots, in consideration of the drilling of certain wells and the payment of the overriding royalty, as hereinafter provided; * * * Houston Oil Company of Texas, * * * does hereby bargain, sell, transfer and assign, subject to the performance of the obligations herein imposed, unto Jay Simmons and J. E. Webb, their heirs and assigns, all of its rights under said existing leases * * * in so far as same cover a thirteen-sixteenths (13/16) working interest in the *oil rights* in and to Lots 23, 24 and 27, except the East 20 acres of each of said Lots 23, 24 and 27 * * *, all of Lot 20, and all of Lot 13 less 10 acres * * *. It is understood that it is the intention

of First Party that this assignment of the *oil rights* shall assign to Second Parties all of the rights under the original oil and gas leases, except the rights of the Southern Alkali Corporation and/or the Southern Minerals Corporation, as evidenced by the contract and assignment of gas rights of April 5, 1932, by and between the Houston Oil Company of Texas and the Southern Alkali Corporation affecting, among other property, the above described property, * * *, to which instrument and all of the terms thereof reference is hereby made, as if same were fully copied herein. Second Parties, by the acceptance hereof, agree, for themselves, * * *, to commence within ten (10) days from such acceptance drilling operations * * *, Second Parties will continue drilling the premises herein assigned with not more than thirty (30) days elapsing between the completion of one well and the commencing of another well, * * * until the premises herein assigned are completely drilled, * * *, in the event said Second Parties, * * *, should fail or refuse to comply with the terms and conditions hereof, * * * revert to First Party, * * *. As further consideration for this assignment, the Houston Oil Company of Texas reserves unto itself, its successors or assigns, an overriding royalty of one-eighth (⅛) in *oil*—that is, ⅛ of 8/8 of the value or proceeds of the *oil* which shall be actually produced, * * * First Party, * * *, shall have the preferential right to purchase the *oil* produced * * *. Second Parties agree and obligate themselves, * * *, to furnish First Party with cuttings and core samples from any and all wells drilled on the premises * * *. Second Parties also agree to furnish First Party a copy of the Schlumberger record of any and all wells; and First Party shall at all reasonable times have access to the premises where the well or wells are being drilled, and First Party shall be permitted to have a representative present to inspect any test made of any ***such well*** * * *."

Clearly, Houston Oil Company did not assign to Respondents Simmons and Webb any of its rights as to completion of gas wells, limited to five in number. As expressed by the minority opinion of the Court of Appeals.

> "Not only in the granting clause of this assignment but throughout, the thing assigned is declared to be, *the oil rights under the Harrell lease*. Nowhere in the assignment is there a reference to gas rights of any kind. It is quite plain therefore, that the parties had in mind, transferring not gas but oil rights, * * * " (R. 465).

Additionally indicative of the absence of any intention by Houston Oil Company to assign to Simmons and Webb its rights to complete gas wells are the following points:

(1) Houston's contract right to complete five gas wells applied to six leases (R. 389) covering 1300 acres of land (R. 207), but it only assigned to Respondents Simmons and Webb (R. 400) "the oil rights" in portions of two of said leases.

(2) The expression of intention "that this assignment of the oil rights shall assign to second parties all of the rights under the original oil and gas leases, except the rights of the Southern Alkali Corporation and/or the Southern Minerals Corporation, as evidenced by the contract and assignment of gas rights of April 5, 1932" (R. 465), cannot be taken as an enlargement of the granting clause which is limited to "oil rights," and negatives any intention to assign any portion of Houston's right to complete five gas wells; Houston's right to complete five gas wells was not a right under "the original oil and gas leases" but was a right provided to Houston under the contract provision of the mentioned assign-

ment to Southern Alkali Corporation. Such contract right was not assigned.

(3) Houston's reservation of an overriding royalty of 1/8 of 8/8 "of the value or proceeds of the *oil* which shall be actually produced" negatives any intention to assign its right to complete gas wells; otherwise, its overriding royalty would have been made to apply to gas as well as to oil.

(4) Houston reserved the right to purchase production of *oil* but not gas.

(5) Simmons and Webb were obligated to furnish Houston with cores and cuttings and Schlumberger records, and to permit Houston's representative to inspect any test of ***any such well;*** thereby clearly indicating intention that the rights of Simmons and Webb were confined to *oil wells.*

(6) Such construction deprives Houston of a valuable property right without any compensation, and without its day in court.

(7) No reference is made to the rights of Houston Oil Company under the contract and assignment of gas rights dated April 5, 1932, and the only purpose of the reference to the rights of Southern Alkali Corporation was to call to the attention of Simmons and Webb that the assignment of the oil rights was subject to the right of Southern Alkali to complete oil wells as provided in said previous assignment.

(8) The contract right to drill five gas wells applied to 1300 acres. It cannot be supposed that Houston Oil Company intended to convey to Simmons and Webb the right to drill all five wells on the portions of the two leases assigned, and no words were used indicative of any intention to assign the right to drill a proportionate number of gas wells or what such proportion should be.

POINT 7

The Court of Appeals Erroneously Construed the Contract Provision as to Gas Wells as Affording a Simple Option Rather Than as Providing a Forfeiture.

The Court of Appeals, in its opinion (R. 459), holds:

> "It is well settled that in the exercise of options the time limited is generally of the essence of the contract. Campbell v. Fetty, 271 Fed. 621, 17 C.J.S., p. 1072. Especially is this true when a thing so uncertain and fluctuating as a new gas well is the subject of the option. 17 C.J.S., p. 1071. The option to take over this well, which was limited to forty days from its completion, could not be exercised four months after its completion. It is unnecessary to enquire whether the further finding of the district court was correct, that the option right was waived by Southern and the waiver was converted into an estoppel because Simmons and Webb made contracts and substantial expenditures on the faith of Southern's statement that it did not wish the well."

In so holding the Court of Appeals construed the contract provision of the assignment as being a simple option rather than a forfeiture provision. CAMPBELL v. FETTY, 271 F. 921, the only case cited by the Court in its opinion in this connection, was a suit to recover on a simple guaranty letter in words as follows:

> "In consideration of this subscription, as I stated to you, should you carry this stock for 24 months, and then desire to dispose of it, I will take it off your hands and allow you 8 per cent. carrying charge. You understand that, should any dividends be paid in the meantime, they would, of course, be deducted from the carrying charge."

The Court in that case held that time was the essence of the

agreement, and since demand was not made at expiration of the 24-month period the option to require defendant to pay for the stock was lost.

The construction by the Court of Appeals of the contract provision of the assignment as being a simple option and not a forfeiture provision is wrong because title to all gas in place in and under the land when the well was drilled having been for a large consideration, vested in Petitioner, loss of the right to "take over" the well necessarily results in forfeiture of Petitioners' title to gas. Such construction and holding is contrary to the weight of authority and in direct conflict with the established law in Texas as announced by the Supreme Court of Texas in JONES v. GIBBS, 133 Tex. 627, 130 S.W. (2d) 268, and is at variance with and contrary to the decision of the Circuit Court of Appeals for the Tenth Circuit in GLOYD v. MIDWEST REFINING COMPANY, 62 F. (2d) 483.

IN JONES v. GIBBS, 133 Tex. 627, 130 S.W. (2d) 268, Jones conveyed to Gibbs all the merchantable pine timber on 1981.2 acres of land with the right for a period of 10 years to remove the same and with the additional right to extend such time an additional 5 years by the payment of 15 cents per acre per year, which

> "shall be paid for as much as one year in advance."

The Court, in holding that such contract right was not a simple option but a conveyance on valuable consideration and therefore to be construed as a forfeiture provision against the heirs of Jones seeking to declare the contract right to renew the contract terminated by the failure of Gibb's successors to strictly comply with the provision for payment of 15 cents per acre, said:

> "Since the privilege to extend the time for removal of the timber is given in the deed itself and is supported by

the consideration paid at the execution of the deed, the agreed value of the timber, and inasmuch as the deed is treated, upon the exercising of the privilege, as a present grant for the full term, including the period of the extension, a judgment decreeing that such deed became no longer operative at the end of the primary term upon the grantee's failure to comply strictly with the terms of the provision for extension, while technically but an adjudication that the grant terminated by its own terms, would, practically considered, and certainly from the viewpoint of the grantees, amount to a forfeiture of a valuable property right for which they had fully paid. In view of these differences between the option for extension granted by the deed to defendants in error and the ordinary option to buy land, it is our opinion that, in determining whether defendants in error did those things necessary under the deed to extend the right to cut the timber, *a too exactly strict compliance with the terms of the option should not be required and that the equities in favor of defendants in error, on account of their having paid the purchase price for all of the timber and having removed less than one-third of it, should not be disregarded.*"

The case of GLOYD v. MIDWEST REFINING COMPANY, 62 Fed. (2d) 483, in construing the nature of the rental payment clause of an oil and gas lease, held that in determining whether the lease had terminated such clause was to be construed as a forfeiture provision and not as a simple option provision, holding:

> "If the lease creates an option to explore, which the lessee may continue and extend by the payment of rental, that option right is forfeited. *This, therefore, is esentially a suit to establish a forfeiture as a matter of record and to obtain the cancellation of the thing forfeited. Equity will only give its aid to enforcement of a forfeiture where to do so is more cognizant with the principles of right, justice, and morality than to withhold it.*"

Had the Court considered the rights of the parties under the rules governing forfeitures rather than the rules governing failure to exercise a simple option, we confidently assert the Court would have held that Petitioner, under the facts and circumstances of this case, did not waive its right and is not estopped to take over the well at "cost to the producing horizon;" and that Petitioner is now entitled to take over the well as of the date of completion and to an accounting for production therefrom.

In seeking to establish a forfeiture the burden of proof is always on the party asserting the forfeiture and claiming the benefits thereof. 19 AM. JUR., pp. 96-99.

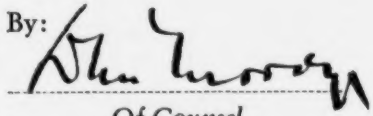
> "Where a litigant, by the terms of his contract, is made liable at law for a penalty or is subject to loss in the nature of a forfeiture, owing to the nonperformance by him of a condition or covenant therein contained, the situation is viewed by equity with extreme disfavor, and the contractual provision will be construed strictly against the interest of the party who claims the benefit thereof. * * * A party who seeks to enforce a forfeiture must show that he has done everything on his part to be entitled to claim enforcement. The burden of proof is cast upon him; and if he fails to establish the necessary facts, his right to insist upon the forfeiture will be deemed to have been waived."

Petitioner's right to take over the well, if it be a gas well, should be reëxamined in the light of the equitable rules governing forfeitures.

WHEREFORE, Petitioner respectfully submits that this case is one over which this Honorable Court has jurisdiction and one calling for the exercise by this Court of its supervisory powers, by granting a Writ of Certiorari and thereafter re-

viewing and reversing said decision, granting to Petitioner the relief to which it is entitled.

SOUTHERN MINERALS CORPORATION,
BY BIRGE HOLT,
Corpus Christi, Texas;
BY DAN MOODY,
Austin, Texas;
BY RALPH R. WOOD,
Houston, Texas.
Counsel for Petitioner

By: 
Of Counsel

Appendix A

Article 6008, Revised Civil Statutes of Texas 1925, as Amended, Acts 1935

* * *

Sec. 3. The production, transportation, or use of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term "waste" among other things shall specifically include:

(a) The operation of any oil well, or wells with an inefficient gas-oil ratio.

(b) The drowning with water of any stratum or part thereof capable of producing gas in paying quantities.

(c) Underground waste or loss however caused and whether or not defined in other subdivisions hereof.

(d) Permitting any natural gas well to burn wastefully.

(e) The creation of unnecessary fire hazards.

(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, or operating well or wells as to reduce or tend to reduce the ultimate recovery of natural gas from any pool.

(g) The escape into the open air, from a well producing both oil and gas, of natural gas in excess of the amount which is necessary in the efficient drilling or operation of the well.

(h) The production of natural gas in excess of transportation or market facilities, or reasonable market demand for the type of gas produced.

(i) The use of natural gas for the manufacture of carbon black without first having extracted the natural gasoline content from such gas.

(j) The use of sweet gas produced from a gas well for the manufacture of carbon black.

(k) Permitting any natural gas produced from a gas well to escape into the air before or after such gas has been processed for its gasoline content.

(l) The production of natural gas from a well producing oil from a stratum other than that in which the oil is found, unless such gas is produced in a separate string of casing from that in which the oil is produced.

(m) The production of more than one hundred thousand (100,000) cubic feet of gas to each barrel of crude petroleum oil unless such gas is put to one or more of the uses authorized for the type of such gas so produced under allocations made by the Commission.

* * *

Sec. 7. After the expiration of ten (10) days from the time of encountering gas in a gas well, no gas from such well shall be permitted to escape into the air, and all gas produced therefrom shall be utilized for the following purposes:

(1) No sweet gas shall be utilized except for:

(a) Light or fuel.

(b) Efficient chemical manufacturing, other than the manufacture of carbon black.

(c) Bona fide introduction of gas into oil, or gas bearing horizon, in order to maintain or increase the rock pressure or otherwise increase the ultimate recovery of oil or gas from such horizon.

(d) The extraction of natural gasoline therefrom when the residue is returned to the horizon from which it is produced.

(2) In addition to the purposes for which sweet gas produced from a gas well may be used, sour gas may be used for efficient chemical manufacturing purposes including the manufacture of carbon black provided it is utilized in a plant producing a recovery of not less than one (1) pound of car-

bon black to each one thousand (1000) cubic feet of gas, and provided further that the gasoline content is removed and saved from such sour gas before the same is utilized for carbon black.

(3) Casinghead gas may be used for any beneficial purpose, which includes the manufacture of natural gasoline.

(4) Any producer of either sweet or sour gas or casinghead gas may use the same as gas lift in the bona fide production of oil where such gas is not used in excess of ten thousand (10,000) cubic feet per barrel of oil produced; provided that in order to prevent waste in any case where the facts in such case warrant it, the Commission may permit the use of additional quantities of gas to lift oil, provided all such gas so used in excess of ten thousand (10,000) cubic feet for each barrel of oil shall be processed for natural gasoline and the residue burned for carbon black when same is reproduced.

Appendix B

Article 6014, Revised Civil Statutes of Texas 1925, as Amended, Acts 1935

The production, storage or transportation of crude petroleum oil or of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term "waste" among other things shall specifically include:

(a) The operation of any oil well or wells with an inefficient gas-oil ratio, and the Commission is hereby given authority to fix and determine by order such ratio; provided that the utilization for manufacture of natural gasoline or gas produced from an oil well within the permitted gas-oil ratio shall not be included within the definition of waste.

(b) The drowning with water of any stratum or part thereof capable of producing oil or gas, or both oil and gas, in paying quantities.

(c) Underground waste or loss however caused and whether or not defined in other subdivisions hereof.

(d) Permitting any natural gas well to burn wastefully.

(e) The creation of unnecessary fire hazards.

(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, locating, spacing or operating well or wells as to reduce or tend to reduce the total ultimate recovery of crude petroleum oil or natural gas from any pool.

(g) Waste or loss incident to, or resulting from, the unnecessary, inefficient, excessive or improper use of the reservoir energy, including the gas energy or water drive, in any well or pool; however, it is not the intent of this Act to require repressuring of an oil pool or that the separately owned properties in any pool be unitized under one management, control or ownership.

(h) Surface waste or surface loss, including the storage either permanent or temporary of crude petroleum oil, or the placing of any product thereof, in open pits or earthen storage, and all other forms of surface waste or surface loss, including unnecessary or excessive surface losses, or destruction without beneficial use, either of crude petroleum oil or of natural gas.

(i) The escape into the open air, from a well producing both oil and gas, of natural gas in excess of the amount which is necessary in the efficient drilling or operation of the well.

(j) The production of crude petroleum oil in excess of transportation or market facilities or reasonable market demand. The Commission may determine when such excess production exists or is imminent and ascertain the reasonable market demand.

The Commission may consider any or all of the above definitions, whenever the facts, circumstances or conditions make them applicable, in making rules, regulations or orders to prevent waste of oil or gas.

Nothing in this Section shall be construed to authorize limitation of production of marginal wells, as such marginal wells are defined by Statute, below the amount fixed by Statute for such wells. (Acts 1919, p. 285; Acts 1929, 41st Leg., p. 694, ch. 313; Acts 1931, 42nd Leg., 1st C.S., p. 46, ch. 26, Sec. 1; Acts 1932, 42nd Leg., 4th C.S., p. 3, ch. 2, Sec. 1; Acts 1935, 44th Leg., p. 180, ch. 76, Sec. 2.)

Appendix C

Article 4642, Revised Civil Statutes of Texas 1925 (4643) (2989)

Judges of the district and county courts shall, in term time or vacation, hear and determine applications for and may grant writs of injunction returnable to said courts in the following cases:

1. Where the applicant is entitled to the relief demanded and such relief or any part thereof requires the restraint of some act prejudicial to him.

2. Where a party does some act respecting the subject of pending litigation or threatens or is about to do some act or is procuring or suffering the same to be done in violation of the rights of the applicant when said act would tend to render judgment ineffectual.

3. Where the applicant shows himself entitled thereto under the principles of equity, and the provisions of the statutes of this State relating to the granting of injunctions.

4. Where a cloud would be put on the title of real estate being sold under an execution against a party having no interest in such real estate subject to the execution at the time of the sale, or irreparable injury to real estate or personal property is threatened, irrespective of any legal remedy at law. (Acts 1907, p. 206; Acts 1909, p. 354; Const., Art. 5, Secs. 8, 16.)

NOV 12 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER, TERM, 1940

No. 404

SOUTHERN MINERALS CORPORATION, *Petitioner*,

v.

JAY SIMMONS, ET AL., *Respondents*

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals For the Fifth Circuit

SOUTHERN MINERALS CORPORATION,
By BIRGE HOLT,
Corpus Christi, Texas;

By DAN MOODY,
Austin, Texas;

By RALPH R. WOOD,
Houston, Texas,
Counsel for Petitioner

ALPHA LAW BRIEF CO., HOUSTON, TEXAS

IN THE

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SOUTHERN MINERALS CORPORATION, *Petitioner*,

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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals For the Fifth Circuit

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TO THE HONORABLE,
THE SUPREME COURT OF THE UNITED STATES:

Southern Minerals Corporation respectfully petitions this Honorable Court to set aside the order, heretofore entered in this cause, denying petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and to grant said petition; and in support of this said petition respectfully shows this Honorable Court:

I.

It was the alternative contention of petitioner, Southern Minerals Corporation, in the Court of Appeals as well as in the District Court, that even though the well in question be, in fact, an oil well, as found by the District Court, respondents *did not own* but had, at most, a right only of *reasonable user* of gas produced therefrom, as a lift of the oil; and that since respondents were exceeding such right of user—in operating the well as a gas well and appropriating and selling the gas off the premises—petitioner was entitled to have such operation and trespass upon its real property right in the gas restrained and to damages for such gas as had theretofore been converted even though the well be an oil well. The Court of Appeals declined to pass upon such contention or to consider petitioner's specifications of error and points raising it. Tacitly the court did so because it was of the opinion that petitioner *having alleged the well to be a gas well* could be awarded no relief if the well be in fact an oil well, even though it be entitled, in such event, upon proof made without objection, claim of surprise, or change of theory, to the relief it prayed. In other words, the Court of Appeals held that petitioner was limited in its right of recovery to the facts pleaded by it regardless of its right under the facts proved. The court accordingly found it unnecessary to find, as a fact, whether the well was a gas well or an oil well; it *assumed* the well to be a gas well and decided the case upon that single assumption without considering petitioner's rights in gas from the well, in the event, as found as a fact by the District Court, it be an oil well. With respect to this matter the court said:

> "Much of the record is taken up with expert testimony as to what the product of this well was in the earth at the pressure and temperature obtaining there and whether the liquid separated out after production is oil; and the *briefs* make a question whether the well is to be classed

> as an oil well or a gas well according to what it taps in the earth or what it produces at the surface. *We enter on no discussion of these matters because it is unnecessary to decide them. We will assume that this is not a well 'producing as much as fifty barrels of oil per day,' but is a well 'producing merchantable gas in marketable quantities,'* ***" and accordingly a gas well,*** *"as described in the working agreement."* (111 F. (2d) 333, 336.) (Emphasis added.)

In its amended complaint upon which the case was tried, petitioner alleged "that defendants Jay Simmons and J. E. Webb in an unsuccessful effort to produce oil from the land drilled and on or about July 5, 1938, completed a well thereon producing, and capable of producing, great quantities of gas," and prayed for injunction restraining the appropriation and sale of the gas and for damages for gas and products of gas theretofore taken (R. 15-21). To this respondents answered, (1) that the well is an oil well and that respondents own and accordingly have the right to appropriate and sell gas produced therefrom with oil; but (2) in the alternative, if the well is a gas well respondents are entitled to all the products thereof (R. 22-27). Petitioner's rights in gas from the well in question, if it be an oil well, were, we earnestly submit, therefore clearly put in issue by the respondents' special pleading if not by petitioner's complaint.

Assuming, however, that under a technical and limited construction thereof, such rights were not put in issue *by the pleadings,* they clearly were raised by proof, made without objection by respondents, and were tried with their implied consent, as clearly evidenced by the announced legal conclusions of the District Court with respect to petitioner's right to the relief it sought not only (1) upon the assumption that the well is a gas well, but (2) also upon the finding of fact that it is an oil well (R. 41, 45-46). Petitioner's rights

in gas from the well in question, if it be an oil well, were likewise properly before and presented to the Court of Appeals by appropriate specifications and propositions (Petitioner's Brief, Court of Appeals, pp. 150, et seq.); to which respondents replied by counter-propositions (Respondents' Brief, Court of Appeals, pp. 148-204) without the remotest suggestion that petitioner was changing the theory from that upon which it had proceeded in the court below or that its rights in gas from the well in question, if it be an oil well, were not in issue or properly before the Court of Appeals. No claim has ever been made by respondents that they were surprised or in any way prejudiced by petitioner's assertion that it was entitled to the relief it prayed, even though the well be in fact an oil well, nor have they ever made the claim that if petitioner were entitled upon the facts proven to injunction and damages, it should be denied such relief because of any deficiency in pleading.

In this state of the record the decision of the Court of Appeals that petitioner (notwithstanding the proof made without objection) was limited in its right of recovery to the facts pleaded by it; that petitioner, having pleaded the well to be a gas well, could recover only in the event it was entitled to recover upon that fact assumption; and that accordingly it was unnecessary for the court to consider petitioner's rights in gas from the well in question if it be an oil well, is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit rendered in the case of LIENTZ v. WHEELER 113 F. (2d) 767; 3 FED. RULES SERVICE 15 b.l, Case 2, *decided since petition for Writ of Certiorari was filed in this cause*. The decision of the court in that case upon the precise question here submitted and made with respect to the new FEDERAL RULES under which the instant cause was filed and tried, sufficiently appears from the following quotation from its opinion:

"The question presented by the first contention is whether under the circumstances present and upon the record in this case the court was authorized to grant recovery upon a contract different from the contract declared upon.

"There is a general rule to the effect that where a plaintiff sues upon an express contract he must recover upon that contract or not at all. Fay v. Missouri Power & Light Co., 33 S.W. (2d) 1056, 1058 (Mo. App.). Parties to a contract may by a subsequent valid agreement modify its terms; but in suits based upon such modified contracts, the contract as so modified must be distinctly pleaded. Koons v. St. Louis Car Co., 203 Mo. 227, 101 S.W. 49, 59. It is appellant's contention that these rules preclude recovery in this case and require a reversal. We think that in a proper case these rules have been modified by the Rules of Civil Procedure.

"In the instant case the plaintiff pleaded and relied upon a contract of employment for the years 1931 to 1936 inclusive providing for a salary of $5,000.00 per year. The defendant filed a general denial and pleaded a counterclaim as an affirmative defense in which it declared upon a contract covering the same period but providing for a salary of $3,600.00 for the year 1931 and $1,800.00 for each of the years 1932 to 1936 inclusive. The plaintiff by reply denied each and every allegation of the counterclaim. The court granted recovery upon a contract for a salary of $5,000.00 for the year 1931 and of $3,600.00 for each of the other years. The plaintiff did not object, did not appeal and did not amend his petition. In their pleadings neither party claimed that the contract provided for the payment of $3,600.00 a year for the years 1932 to 1936. No such issue was presented by the pleadings.

* * *

"The finding of the court that the contract in force for the year 1931 provided for a salary of $5,000.00 a year and that this contract was modified so that it provided for $3,600.00 a year for the succeeding years is supported by substantial evidence. *Both parties upon*

the trial contributed to the production of such evidence. The evidence was not objected to on the ground that it was not within the issues. It is a fair inference from the record that the parties impliedly consented to try the issue upon which the court's finding rests. The result is not, therefore, under the rule affected by the failure to amend the complaint.

* * * " (Emphasis added.)

A report of the decision in the case of LEINTZ v. WHEELER just referred to was not available to counsel for petitioner and did not come to their attention in time properly to present it in support of the petition for Writ of Certiorari. The Court of Appeals in the instant case could properly have declined to pass upon petitioner's rights in gas from the well in question, if an oil well, only because it was of the opinion that such rights had not been properly pleaded and were therefore not in issue; a consideration of them was accordingly held to be unnecessary to a decision of the case. It is now made clear that such holding of the Court of Appeals is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in the case herein referred to. In view of such conflict petitioner earnestly seeks a reconsideration of its petition for Writ of Certiorari and particularly of the first, second and third reasons therein set forth for granting it. It is primarily to supplement such reasons that the point here presented is made.

Petitioner submits that the Court of Appeals, in declining to pass upon petitioner's rights in gas from the well in question if it be an oil well, upon a claimed technical deficiency in the pleading without regard to the proof, has committed error to the very great detriment of petitioner. In failing to pass upon petitioner's specifications of error and points presenting such rights, the Court of Appeals has erroneously declined to apply to this case Rules 15 and 54 of the new Rules of Civil Procedure and, accordingly, has declined to determine

novel questions of substantive law of vital importance not only to petitioner in the instant litigation but to the oil and gas industry in general, or has, by implication, determined important questions of local law contrary to the decisions of the Supreme Court of Texas, all as pointed out in said petition for Writ of Certiorari.

II.

What has been said in the first part of this petition with respect to conflict of decision applies with equal force to the holding of the Court of Appeals in the instant case (111 F. (2d) 333, 336) that petitioner, having alleged in its complaint that respondents completed the well "in an unsuccessful effort to produce oil," was precluded thereby from contending that respondents had *not* complied with the contract conditions giving them the right, in the event the well be a gas well, to take the products therefrom upon petitioner's failure to exercise its option to take the well over, notwithstanding petitioner had established such contention by undisputed proof made without objection, as pointed out in the Petition for Certiorari as the third and fourth reasons for granting it.

The contract provision of the assignment from Houston Oil Company to Southern Alkali Corporation (petitioner's predecessor in title) gave the former, and in consequence respondents (as successors in interest to Houston Oil Company), the right to complete a gas well, and take the products therefrom, only in the event Houston Oil Company "as a result of its operations, discovered gas in any well" drilled by it "in an unsuccessful effort to complete a commercial oil well" and Southern Alkali Corporation, or petitioner, failed to exercise its option to take the well over (R. 389, 395).

Respondent J. E. Webb, a partner of his corespondent Jay Simmons and in charge of the drilling of the well (R. 221),

testified upon cross-examination without objection (1) that a good oil well could have been completed in three or four shallower sands and (2) that respondents did not discover gas in the well in question "in an unsuccessful effort to complete a commercial oil well" (R. 231-234). This evidence was material only upon the question of whether or not respondents had performed the conditions of the assignment above quoted giving them the right to complete a gas well and take the products in the event petitioner failed to exercise its option to take the well over. The testimony related to a matter particularly within the knowledge of respondents. It was admitted without objection or claim of surprise by the respondents as to proof of fact or as to theory upon which petitioner was proceeding. There was no claim that any prejudice resulted from the above quoted allegation of petitioner's petition nor that such proof was not within the issues made thereby.

This question, therefore, having been tried with the implied consent and without the objection of the parties the holding of the Court of Appeals that petitioner could not —because of the pleadings and notwithstanding the proof —recover upon the theory that respondents had not complied with the terms of their contract is clearly in conflict with the decision of the Court of Appeals for the Eighth Circuit rendered in the case of LIENTZ v. WHEELER (113 F. (2d) 767), referred to in the first part of this petition and decided since petition for Writ of Certiorari was filed in this cause. The point here made is intended primarily to supplement the third and fourth reasons set forth therein for granting the petition for Writ of Certiorari herein.

WHEREFORE, petitioner respectfully prays the court that this petition for rehearing be granted, that the order heretofore entered herein by this Honorable Court denying Writ of Certiorari be set aside, and that upon its petition for Writ of

Certiorari supplemented by this petition for rehearing, a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Fifth Circuit, at New Orleans, commanding said court to certify and send to this Court on a day certain to be named therein, a full and complete transcript of the record and of the proceedings had in said court in the case numbered and entitled on its docket No. 9183, Southern Minerals Corporation, Appellant, v. Jay Simmons, et al., Appellees, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgments of the Circuit Court of Appeals and of the District Court be reversed by this Court and judgment rendered for petitioner granting the injunction and damages as prayed, or in the alternative, that this cause be remanded to the Circuit Court of Appeals for a more complete statement of facts as found by that court and conclusions upon which its judgment was based, and for such other and further relief as to this Honorable Court may seem proper. Counsel for petitioner certify that this petition for rehearing is presented in good faith and not for delay.

DATED this the 11th day of November, A. D. 1940.

SOUTHERN MINERALS CORPORATION,
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By DAN MOODY,
Austin, Texas;
By RALPH R. WOOD,
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Counsel for Petitioner

By: Dan Moody
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